

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

DANIEL KENNETH CRAIG,

Petitioner,

Case Number: 00-70002

v.

HONORABLE ARTHUR J. TARNOW

HAROLD WHITE,

Respondent.

_____ /

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS¹

I. Introduction

Petitioner Daniel Kenneth Craig, a state inmate currently incarcerated at the Riverside Correctional Facility in Ionia, Michigan, has filed a *pro se* petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, alleging that he is incarcerated in violation of his constitutional rights. For the reasons set forth below, the Court denies the petition.

II. Facts

Petitioner's conviction arises out of the kidnapping and sexual assault of Pamela Henderson. During Petitioner's trial, Ms. Henderson testified that, on the afternoon of June 20, 1994, she was walking down a Detroit city street when Petitioner approached her and asked her if she was dating. Ms. Henderson understood Petitioner to be asking her whether she was a prostitute. She testified that she told him she was not, whereupon Petitioner became angry, called her a liar, and pulled out a knife. Ms. Henderson testified that Petitioner then took her to a

¹Staff Attorney Mary Beth Collery provided quality research assistance.

party store where he gave her money to buy a lottery ticket. When they walked into the party store, Petitioner put the knife up his shirt sleeve. Ms. Henderson said that she felt threatened by Petitioner while they were in the party store, and that she did not ask anyone in the store for help for that reason.

Petitioner and Ms. Henderson then left the party store. Petitioner again held the knife by Ms. Henderson's side when they were outside. He then flagged down a cab. When they got into the cab, Petitioner put his knife away and told the cabdriver to go to Seneca and Moffett streets, where he lived. Ms. Henderson testified that she did not attempt to tell the cabdriver that Petitioner had forced her into the cab at knifepoint, because she feared Petitioner.

When the cab reached the destination, Petitioner led Ms. Henderson to the apartment building where he lived. At this point, Petitioner's knife was still in his pocket, but, Ms. Henderson testified, she did not try to run because she feared making Petitioner angry.

Petitioner took Ms. Henderson to his apartment and led her into his bedroom where he showed her a nine-gauge gun and told her he would shoot her if she tried to escape. Ms. Henderson testified that Petitioner held her at his apartment against her will until June 26, 1994, when she managed to escape to a neighbor's apartment. Ms. Henderson further testified that over that seven-day period, Petitioner forced her to have vaginal intercourse with him numerous times, forced her to engage in fellatio once, performed cunnilingus on her once, and penetrated her anus with his finger once. Petitioner hit her in the head with a gun once when she tried to escape. He frequently tied together her arms and legs so that she could not escape. He also poured pepper in her eyes. He rubbed cooking shortening on both of them during intercourse. At one point, she managed to stab him in the back with his knife, but was unable to escape. She

claimed that Petitioner tied her up and locked her in a closet in the basement on a few occasions when he left the building.

Ms. Henderson testified that, on June 26, 1994, she was tied up and locked in the basement closet when she managed to escape the closet and flee to neighbor Karen Meeks' apartment. Shortly thereafter, the police were contacted and Ms. Henderson was taken to the hospital.

Karen Meeks testified at trial that at about 5:00 p.m. on June 26, 1994, a woman later identified to be Ms. Henderson, wearing only a slip, ran into her apartment. Ms. Henderson, who was crying, said she had come from the basement and that she had finally gotten away. Ms. Henderson described Petitioner to Ms. Meeks and asked Ms. Meeks to go down to the street to make sure that Petitioner was not on his way home. Ms. Meeks testified that she did so. When she told Ms. Henderson that no one meeting that description was on the street, Ms. Henderson fled.

Detroit Police Officer Christopher VinteVoghel testified that, on June 26, 1994, he and his partner responded to a call regarding an alleged sexual assault. At approximately 6:00 p.m., VinteVoghel and his partner arrived at Moffett Street where Ms. Henderson was being attended to by EMS personnel. Ms. Henderson informed VinteVoghel that she had been abducted earlier in the week, held captive at a nearby apartment, and repeatedly raped. VinteVoghel noted that Ms. Henderson had abrasions on her wrists consistent with the skin having been rubbed away in a circular fashion. Ms. Henderson further told VinteVoghel that her abductor had a shotgun and shotgun rounds, that she had been bound with rope, that her abductor had used cooking shortening as lubricant during intercourse, and that he had sprayed pepper spray into her eyes.

After questioning Ms. Henderson, Officer VinteVoghel proceeded to the apartment building identified by her. The building had boarded-up windows, the front door was unlocked, and most of the units in the building were open and apparently unoccupied. Officer VinteVoghel and his partner entered apartment 5 through a closed, but unlocked, door. Once inside the apartment, Officer VinteVoghel observed a shotgun, shotgun shells, a spray bottle with pepper in it, a pair of women's panties, and a can of shortening which appeared to have finger marks in it.

Petitioner testified in his own defense. Petitioner claimed that Ms. Henderson willingly spent seven days in his apartment. He testified that Ms. Henderson agreed to have sex with him in exchange for money. According to Petitioner, on June 20, 1994, he was walking down a Detroit city street when Ms. Henderson approached him and asked him if he wanted to date her. He understood this to be an offer of sex for money, which he accepted.

Petitioner testified that he and Ms. Henderson then went into a party store so that he could get change for a twenty dollar bill as Ms. Henderson was going to charge him ten dollars for sex. Petitioner stated that he then took Ms. Henderson to his apartment and that at no time did he have a knife. He testified that she spent a week with him during which time they left the apartment together a couple of times to go to the market. He further testified that Ms. Henderson would leave his apartment twice a day to purchase crack which she would then return to his apartment to smoke. At one point during the week, according to Petitioner, Ms. Henderson became angry with him because he would not buy her anymore crack and stabbed him with a knife. He claimed that in self-defense he then sprayed her in the eyes with a pepper-water spray which he had on hand to use on mice.

On June 26, 1994, Petitioner went to his father's house. He testified that when he returned his apartment looked like it had been ransacked. He then went to go report the break-in to police. He flagged down a police car, told them about the break-in, then told them his name whereupon he was arrested and charged with rape.

Following his arrest, Petitioner gave a statement to police officer Gerrod Lewis that was the subject of a motion to suppress prior to trial. The trial court denied defendant's motion to suppress. In his statement to police, Petitioner admitted to having had intercourse with Ms. Henderson numerous times over the seven-day period. He also admitted to throwing pepper in her eyes. He stated that he tied her up because she had stabbed him once and he wanted to prevent her from stabbing him again. He claimed to have threatened her with a gun once because he was trying to prevent her from jumping out of a second floor window.

III. Procedural History

Following a jury trial in Recorder's Court for the City of Detroit, Petitioner was convicted of two counts of first-degree criminal sexual conduct, one count of kidnapping, and one count of possession of a firearm during the commission of a felony. He was sentenced to twenty-five to fifty years imprisonment for each of the first-degree criminal sexual conduct convictions, and for the kidnapping conviction. He was also sentenced to two years imprisonment for the felony-firearm conviction.

Petitioner filed an appeal of right in the Michigan Court of Appeals, presenting the following claims:

- I. The trial court judge created reversible error when he denied defendant's motion to suppress evidence on the basis of an illegal search and seizure.

- II. The trial court judge created reversible error when he denied defendant's motion to suppress defendant's statement at the Walker hearing.
- III. The trial court judge created reversible error when he decided that the prosecutor and the police department exercised due diligence to find the checker cab driver as a trial witness.
- IV. The trial court judge violated the principle of proportionality when he sentenced defendant to 25 to 50 years in prison on the two criminal sexual conduct convictions and the kidnapping conviction.

On July 15, 1997, the Michigan Court of Appeals issued an unpublished opinion affirming Petitioner's conviction and sentence. People v. Craig, No. 185882 (Mich. Ct. App. July 15, 1997).

Petitioner then filed an application for leave to appeal to the Michigan Supreme Court, presenting the same issues presented on direct appeal to the Michigan Court of Appeals. The Michigan Supreme Court denied leave to appeal. People v. Craig, 457 Mich. 878 (1998).²

On June 22, 1999, Petitioner filed the pending habeas corpus petition in the United States District Court for the Western District of Michigan, which transferred the petition to this Court pursuant to 28 U.S.C. § 1406(a). The pending petition for a writ of habeas corpus presents the following issues:

² In his petition for a brief of habeas corpus, Petitioner states that he filed a motion for relief from judgment in the trial court, which was denied. The record before the Court, however, contains no evidence that a motion for relief from judgment was filed. Petitioner further states that he appealed the trial court's decision but does not indicate to which court. Again, the record before the Court and a review of the Michigan Court of Appeals and Michigan Supreme Court dockets fails to show any such appeal. Because it appears that Petitioner currently has no appeal pending in state court and the claims presented in this petition were exhausted in state court, the question whether Petitioner in fact did file a motion for relief from judgment in state court does not impact this Court's disposition of the pending petition.

- I. The trial court judge created reversible error when he denied defendant's motion to suppress evidence on the basis of an illegal search and seizure.
- II. The trial court judge created reversible error when he denied defendant's motion to suppress defendant's statement at the Walker hearing.
 - A. The confession was obtained without warning defendant of his constitutional rights.
 - B. The waiver of rights was not voluntary, knowing, or intelligent.
- III. The trial court judge created reversible error when he decided that the prosecutor and the police department exercised due diligence to find the checker cab driver as a trial witness.

IV. Analysis

A. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 ("AEDPA") altered the standard of review federal courts must apply when reviewing applications for a writ of habeas corpus. The AEDPA applies to all habeas petitions filed after the effective date of the act, April 24, 1996. Because petitioner's application was filed after April 24, 1996, the provisions of the AEDPA, including the amended standard of review, apply to this case.

As amended, 28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the

merits in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

28 U.S.C. § 2254(d). Therefore, federal courts are bound by a state court’s adjudication of a petitioner’s claims unless the state court’s decision was contrary to or involved an unreasonable application of clearly established federal law. Franklin v. Francis, 144 F.3d 429 (6th Cir. 1998). Additionally, this Court must presume the correctness of state court factual determinations. 28 U.S.C. § 2254(e)(1)³; *see also* Cremeans v. Chapleau, 62 F.3d 167, 169 (6th Cir. 1995) (“We give complete deference to state court findings unless they are clearly erroneous”).

The United States Supreme Court has explained the proper application of the “contrary to” clause as follows:

A state-court decision will certainly be contrary to [the Supreme Court’s] clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . .

A state-court decision will also be contrary to this Court’s clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and

³ 28 U.S.C. § 2254(e)(1) provides, in pertinent part:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct.

nevertheless arrives at a result different from [the Court's] precedent.

Williams v. Taylor, 120 S. Ct. 1495, 1519-20 (2000).

With respect to the “unreasonable application” clause of § 2254(d)(1), the United States Supreme Court held that a federal court should analyze a claim for habeas corpus relief under the “unreasonable application” clause when “a state-court decision unreasonably applies the law of this Court to the facts of a prisoner’s case.” Id. at 1521. The Court defined “unreasonable application” as follows:

[A] federal habeas court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was objectively unreasonable. . .

[A]n unreasonable application of federal law is different from an incorrect application of federal law. . . . Under § 2254(d)(1)’s “unreasonable application” clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Id. at 1521-22.

With this standard in mind, the Court proceeds to the merits of the petition for a writ of habeas corpus.

B. Trial Court’s Denial of Motion to Suppress Evidence

Petitioner claims that he is entitled to habeas corpus relief because the trial court erred in denying his motion to suppress evidence discovered pursuant to an allegedly illegal search and seizure.

The Supreme Court has held that “where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at trial.” Stone v. Powell, 428 U.S. 465, 494-95 (1976). In the instant case, Petitioner’s Fourth Amendment claim was the subject of an evidentiary hearing in the trial court where the facts of his claim were fully developed. Following the hearing, the trial court denied Petitioner’s motion to suppress. Petitioner then had an opportunity to present his Fourth Amendment claim to the Michigan Court of Appeals and Michigan Supreme Court. The Michigan Court of Appeals denied Petitioner’s appeal, stating, in pertinent part:

Defendant first argues on appeal that the trial court erroneously denied defendant’s motion to suppress the evidence received pursuant to an illegal search and seizure. We disagree. The trial court’s decision to deny a motion to suppress evidence will not be reversed unless it is clearly erroneous. . . . Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. . . .

Defendant contends that the trial court erroneously concluded that the apartment building appeared abandoned, thereby justifying the police officers’ entry. We disagree. The testimony given by VinteVoghel indicated that the building appeared vacant and had boarded-up windows. The main entrance doors to the building were open and the first floor was empty, but for a lawnmower in an empty apartment. The second floor also appeared vacant and all of the doors were open. While walking through one of the units, VinteVoghel observed a stove, dresser, couch, and other furniture items.

We are not left with a definite and firm conviction that a mistake was made by the trial court in finding that the building appeared abandoned: this justified the officers’ search of the building without a warrant. . . . We hold that the officers’ search of the apartment building was reasonable under all of the circumstances presented because an owner no longer has an expectation of

privacy in the property he has abandoned. Abandonment is an ultimate fact or conclusion that generally is based on a combination of act and intent. People v. Rasmussen, 191 Mich. App. 721, 725 (1991).

People v. Craig, slip op. at 1-2.

Based on the evidentiary hearing conducted in the trial court, the Michigan Court of Appeals' decision, and Petitioner's failure to present any evidence to the contrary, this Court concludes that Petitioner's Fourth Amendment claim was fully and fairly litigated in the Michigan trial and appellate courts. Consequently, this claim is not cognizable on habeas review.

C. Trial Court's Denial of Motion to Suppress Petitioner's Statement to Police

Petitioner next claims that he is entitled to habeas corpus relief because the trial court erroneously denied his motion to suppress his statement to police. Petitioner argued that his statement was not knowingly and voluntarily made because police interrogated him before informing him of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and he mistakenly believed that he was automatically assigned an attorney upon being informed of his rights.

A confession is considered involuntary if: (1) the police extorted the confession by means of coercive activity; (2) the coercion in question was sufficient to overbear the will of the accused; and (3) the will of the accused was in fact overborne "because of the coercive police activity in question." McCall v. Dutton, 863 F.2d 454, 459 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989). When determining whether a confession is voluntary, the ultimate question is "whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." Miller, 474 U.S. at 112. Those circumstances include:

1. Police Coercion
2. Length of Interrogation
3. Location of Interrogation
4. Continuity of Interrogation
5. Suspect's Maturity
6. Suspect's Education
7. Suspect's Physical Condition and Mental Health
8. Whether Suspect Was Advised of Miranda Rights

Withrow v. Williams, 507 U.S. 680, 693-94 (1993). All of the factors surrounding the confession should be scrutinized closely. Culombe v. Connecticut, 367 U.S. 568 (1981).

However, without coercive police activity, a confession should not be found to be involuntary.

Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause”).

The trial court conducted an evidentiary hearing regarding Petitioner's motion to dismiss at which Petitioner and Police Officer Gerrod Lewis, the interrogating officer, testified.

Petitioner testified that Police Officer Lewis failed to apprise him of his Fifth Amendment rights prior to interrogating him and that he believed that when signed the form acknowledging that he had been informed of his rights, he thought that he was signing a form to have counsel appointed to him. Officer Lewis testified that he asked Petitioner a few background questions, such as his name, address, and level of schooling, prior to advising him of his Miranda rights. He further testified that prior to questioning Petitioner regarding any information relevant to the charges

against Petitioner, he informed Petitioner of his Miranda rights. The trial court held that Petitioner's statement to police was admissible.

In his appeal of right to the Michigan Court of Appeals, Petitioner argued that the trial court erred in denying his motion to suppress. The Michigan Court of Appeals held, in pertinent part:

Defendant further asserts that the trial court erroneously denied defendant's motion to suppress his statement. We disagree. . . .

Defendant argues that the trial court committed clear error in failing to suppress his statement because (1) Lewis admitted that he took information from defendant before reading him his constitutional rights, (2) defendant asserted that Lewis did not read him his rights until after the statement was taken down, and (3) defendant mistakenly believed that as soon as his rights were read to him, he automatically was assigned an attorney. We disagree.

This Court has held that the simple asking of a defendant's name is not interrogation or an investigative question requiring the issuance of Miranda warnings. . . . This Court has also held that interrogation refers to express questioning and to any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response from the subject. . . . Lewis testified that he asked defendant various background questions prior to reading defendant his rights while making the interrogation record because he was not asking defendant anything pertaining to the allegations against him. Since the simple asking of a defendant's name is not interrogation or an investigative question requiring the issuance of Miranda warnings, . . . and since these questions were not reasonably likely to elicit incriminating responses, . . . we hold that the trial court did not commit clear error in denying defendant's motion to suppress these answers.

In determining voluntariness, the court should consider all of the circumstances, including: (1) the age, education, and intelligence of the accused, (2) the extent of his previous experience with the police, (3) the repeated and prolonged nature of the questioning, (4) the length of the detention of the accused before he gave the

statement in question, (5) the lack of any advice to the accused of his constitutional rights, (6) whether the accused was deprived of food, sleep, or medical attention, and (7) whether the suspect was threatened with abuse. People v. Cipriano, 429 N.W.2d 781 (Mich. 1988). In addition, a defendant must be informed by the police that a retained attorney is immediately available for consultation. The failure to do so before a confession is obtained precludes a knowing and intelligent waiver of defendant's right to remain silent. People v. Bender, 551 N.W.2d 71 (Mich. 1996).

Viewing the totality of the circumstances, . . . we hold that the trial court correctly concluded that defendant knowingly, intelligently, and voluntarily made a statement to Lewis after he had been informed of his rights. Although the testimony of Lewis and defendant was conflicting, the trial court held that the confusion arose because Lewis initially took down background information prior to reading defendant his rights, which was consistent with defendant's testimony. The trial court found that the setting was not coercive, and that by defendant's own admissions, he was not promised anything or threatened in any way. Lewis testified that defendant appeared coherent, and that defendant told him that he was not under any influences. Defendant did not appear hungry, tired or injured to Lewis when making his statement. Since this Court gives deference to the trial court's superior ability to judge the credibility of the witnesses and will not reverse the trial court's factual findings unless they are clearly erroneous, . . ., we conclude that the trial court did not commit clear error in finding defendant's statement to be knowing, intelligent and voluntary.

This Court has held that an ambiguous indication of interest in having counsel requires cessation of police interrogation. People v. White, 477 N.W.2d 143 (Mich. Ct. App. 1991); People v. Myers, 404 N.W.2d 677 (Mich. Ct. App. 1987). We hold that the trial court properly concluded that defendant did not invoke his immediate right to counsel when he mistakenly believed that he was requesting an attorney by signing the rights form. Defendant expressed his willingness to talk to Lewis and relay his side of the story to him without any concern of having an attorney present. The facts of the instant case are distinguishable from prior cases where defendants have made such comments as, "Could I talk to someone" [fn. White, 191 Mich. App. 297], and "Maybe I should have an attorney" [fn. Myers, 158 Mich. App. 7]. Defendant did not ask for an attorney or make any comment regarding his desire

for outside assistance, although he may have wanted an attorney or thought he was automatically assigned one. Therefore, we find no error in the trial court's ruling.

People v. Craig, slip op. at 3-4.

Petitioner has failed to show that the Michigan Court of Appeals decision that his statement was voluntary was contrary to or an unreasonable application of Supreme Court precedent. First, Petitioner was not entitled to have his Miranda rights read to him prior to questions designed to elicit routine biographical information. Pennsylvania v. Muniz, 496 U.S. 582, 601 (plurality opinion) (establishing a "routine booking question" exception under which questions regarding name, address, height, weight and other general information do not constitute interrogation). Second, Petitioner claimed that he was not advised of his rights until after he gave his statement to police. At the evidentiary hearing, the questioning officer testified that he advised Petitioner of his rights prior to questioning him. The trial court resolved the issue of credibility on this disputed factual issue in favor of the police officer. The "assessment of the credibility of witnesses is generally beyond the scope of review" for a federal court on habeas review. Schlup v. Delo, 513 U.S. 298, 330 (1995).

Moreover, "a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume . . . that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." Jackson, 443 U.S. at 325. Therefore, this Court must defer to the state court's determination regarding the credibility of the police officer's testimony that he apprised Petitioner of his Miranda rights prior to interrogating him.

Finally, Petitioner claims that his statement was involuntary because he mistakenly believed that once he signed the acknowledgment of constitutional form an attorney would immediately be assigned to him. He does not claim that he invoked his right to counsel and then was questioned further by police, nor does he claim that the police affirmatively misrepresented his rights. He does not claim that he expressed a wish not to be questioned further until an attorney was present. Petitioner's unspoken, mistaken belief that counsel would be appointed immediately did not serve to invoke his right to counsel. *See Davis v. United States*, 512 U.S. 452, 458-59 (1994) ("Invocation of the Miranda right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney . . . the suspect must unambiguously request counsel."). Moreover, at the hearing on his motion to suppress, he told the trial court that he wanted to tell the police officer his side of the story. Thus, Petitioner has failed to establish police coercion or that he continued to be interrogated after unambiguously requesting counsel.

Accordingly, Petitioner is not entitled to habeas corpus relief with respect to this claim.

A. Prosecutor's Failure to Locate a *Res Gestae* Witness

Finally, Petitioner claims that he is entitled to habeas corpus relief because the prosecutor failed to find the driver of the Checker Cab who transported Petitioner and Ms. Henderson to Petitioner's apartment. Petitioner claims that the prosecutor thereby violated a trial court order requiring the Detroit police department to use due diligence in locating the driver.

"The prosecution in a criminal trial must make a good faith effort to produce relevant witnesses. The standard for evaluating whether the prosecution has made a good faith effort to

produce a witness is one of reasonableness.” Ethridge v. Withrow, 2000 WL 1137733 (E. D. Mich. July 24, 2000), *citing* Ohio v. Roberts, 448 U.S. 56, 74 (1990).

Detroit Police Officer Gilbert Evans testified that he was made aware of the trial court’s order requiring the police department to exercise due diligence in locating the cabdriver in January 1995. In response to the Order, Officer Evans contacted the Checker Cab Company. He was informed by a manager that records of cab pick-ups were destroyed 90-95 days after they were made. He was further informed that after that ninety-day period elapsed, it was impossible to determine the identity of a cab driver without a cab number, which police did not have. Thereafter, Officer Evans conducted no further investigation.

The Michigan Court of Appeals held that the prosecution made a good faith effort to locate the cabdriver:

Defendant next argues on appeal that the trial court erroneously decided that the police exercised due diligence in attempting to locate the cab driver. We disagree. . . .

The test for due diligence is whether good-faith efforts were made to procure the testimony of the witnesses, not whether increased efforts would have produced it. People v. Watkins, 209 Mich. App. 1, 4 (1995). The prosecution is required to do everything reasonable, rather than everything possible, in locating a *res gestae* witness. People v. Joseph LeFlore, 122 Mich. App. 314, 319 (1983). We conclude that a good-faith effort was made by [police officer] Evans when she contacted Checker Cab Company and learned that the records had been destroyed. All of the records were on computer, and were only saved for ninety to ninety-five days. Even if Evans had called on November 22, 1994, the date of the entry of the trial court’s order, the records still would have been destroyed as ninety-five days had passed. Since each cab driver worked as an independent contractor, there was no way to determine who worked what shift without knowing the cab number. The trial court did not err in its due diligence determination.

People v. Craig, slip op. at 4.

This Court finds that the state court's determination that the prosecution exercised due diligence in attempting to locate the cabdriver was not contrary to or an unreasonable application of Supreme Court precedent.

II. Conclusion

For the foregoing reasons, the petition for a writ of habeas is **DENIED** and the matter is **DISMISSED WITH PREJUDICE**.

/s/

ARTHUR J. TARNOW
UNITED STATES DISTRICT JUDGE

DATE: February 28, 2001